
(1982) 01 KL CK 0008
In the High Court Of Kerala
Case No : Writ Appeal No. 221 of 1980

Corporation of Cochin and Another	Vs	APPELLANT
K. Janardhanan		RESPONDENT

Date of Decision : 12-01-1982

Acts Referred:

Kerala High Court Rules, 1971 — Rule 145
Kerala Municipal Corporation Act, 1961 — Section 230, 263, 406

Citation : AIR 1983 Ker 148 : (1982) 1 ILR (Ker) 532

Hon'ble Judges : V. Khalid, J;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : S. Narayanan Poti, for the Appellant; T.P. Kelu Nambiar, P.C. Rajagopalan and Devakikutty, for the Respondent

Final Decision : Allowed

Judgement

Khalid, J.—This appeal is directed against the order of a learned Judge of this Court in C.M.P. No. 7987 of 1980 in O. P. No. 1176 of 1980-F. The appellants are the Corporation of Cochin and its Town planning Officer and the respondent, the petitioner in the O. P.

2. The facts of the case, in brief, are as follows. The respondent erected a milk booth for the purpose of carrying on milk trade on the footpath by the side of Subhash Park without obtaining any permission from the Corporation. When he was asked to dismantle and remove the same, he moved the Government and obtained a stay of the proceedings by the Corporation. Thereafter the Government passed orders asking him to shift the booth to another convenient place with the permission of the Corporation. He then made an application on 12-9-1977 offering to erect the booth in front of the Corporation office and inter alia proposed that the booth "will cover the open gutter, the area behind the gutter and a portion of land owned by the K.S.R.T.C.". He also stated that he will obtain the formal sanction from K.S.R.T.C. at an early date. This was sanctioned by the Corporation by Ext. P-3 order dt. 17-2-1978 with which was annexed a

site-plan produced as Ext. R2. The proposed booth was to cover only the gutter and the land behind as offered in his application. The respondent however did not avail himself of the sanction and continued his unlawful occupation of the booth erected by him. The Corporation then issued a notice to him to remove the booth. Thereupon he filed the O. P. and obtained a stay of the proceedings of the Corporation. The O. P. was disposed "if by the learned Judge as follows by his judgment dt. 18-4-1980 --

"Having gone through the records and having heard the counsel for the petitioner and the counsel for the Corporation, I am satisfied that the ends of justice would be met if a direction is given to the respondents to allow the petitioner to shift his milk booth to the place suggested in Ext. P-3 notice TP6/16342/77 dated 17-2-78. The Petitioner is directed to see that the shifting is completed within two months from this date. I am sure the respondents will also extend their co-operation for the petitioner obtaining electric connection and other facilities."

3. Instead of shifting the booth to the site in Ext. P3 as directed by the judgment he constructed the booth above the gutter and on the footpath by which 3/4th of the footpath was covered, in clear violation of the proposal in Ext. R1. The sanction granted under Ext. P3 and the direction in the judgment. On 2-6-1980 it was brought to the notice of the Assistant Town Planning Officer that the booth was being constructed on the footpath, and in contravention of the sanction, opposite to the Corporation office. Thereupon, the Assistant Town Planning Officer gave notice to persons who were carrying on the construction to desist from further construction and to remove the unlawful structure within an hour. As this was not complied with, the Corporation removed the unlawfully erected structure. Then the petitioner moved this Court by the C.M.P. praying that the damage done to him may be repaired, his Milma Kiosk may be directed to be restored to its original place and for appropriate action for violating this Court's judgment. The respondent alleged that on the morning of 2-6-1980, the respondent's salesman opened the booth by about 9.00. A.M. Immediately thereafter 7 or 8 employees of the Corporation came in a van belonging to the Corporation, asked the salesman to keep away from the booth and started demolishing the booth. The salesman pleaded with the men not to demolish the booth. But he was driven away by the Corporation employees. The case put forward before the learned Judge was that the demolition of the booth was in violation of the provisions contained in Section 230 of the Kerala Municipal Corporations Act, 1961. for short, the Act. The learned Judge accepted this plea and directed the Corporation to carry out the repairs asked for within a week from the date of the order, and required the petitioner to instal the booth if he chose to do so in the place indicated in Ext. P3 order. It is this order that is challenged before us in this writ petition.

4. The objection to the application before the learned Judge was two fold: (1) the petitioner should have filed an independent O.P. and not a C.M.P., and (2) the action of the Corporation was justified since the Commissioner had the requisite

powers to demolish the unauthorised construction u/s 406 of the Act. The learned Judge held against the plea regarding the maintainability of the C.M.P. observing that relief cannot be denied to the petitioner on such a technical ground. According to the learned Judge, the procedure in such cases is laid down in Section 263 of the Act and since that procedure was not complied with, the petitioner was entitled to succeed.

5. The learned counsel for the appellants submits that the learned Judge was in error in holding that Section 263 applied to the facts of the case. According to him, Section 263 has no application to the case. The case is governed by Section 230 read with Section 406. We will now examine the correctness of the submissions.

6. Section 230 is in Chapter IX of the Act, which deals with "streets". Ss. 228 to 235 come under the sub-heading "encroachment on streets". Section 263 is in Chap. X, dealing with building regulations. Section 263 is under the heading "powers of commissioner". What is contended is that the provisions contained in Chap. X deal with construction of buildings on private properties while Chap. IX deals with properties which have vested in the Corporation. AS a corollary to this submission, it is contended that the procedure laid down in Section 263, which mandates the issuance of a provisional order on the owner or the builder to demolish the work done, need be complied with only if the structure involved is situated on a private property Since admittedly the booth in question was not on private property but on a property which had vested in the Corporation, Section 263 and the procedure laid down therein are not applicable. In our view, this submission is well founded, and has to be accepted. With great respect, the reliance placed by the learned Judge on Section 263 of the Act, to fault the action of the Corporation and to give the direction contained in the order under appeal cannot be justified.

7. Now we will examine the case put forward u/s 230 of the Act. Section 230, Sub-section (1) reads as follows;

"230 Removal of encroachment. -- (1) the Commissioner may by notice require the owner or occupier of any premise to remove or alter any projection, encroachment, or obstruction (other than a door, gate, bar, or ground-floor window) situated against or in front of such premises and in or over any street or any public place the control of which is vested in the Corporation."

It is true that the section does not provide for the procedure to be adopted by the Commissioner for removal of encroachment. According to the learned counsel for the appellants, this power is provided in Section 406 of the Act, which, according to him, is a general power given to the Commissioner to execute any work in default. Section 406 reads as follows:

"406. Time for complying with order and power to enforce in default;-- (1) Whenever by any notice, requisition, or order under this Act or under any rule, bye-law or regulation made under it any person is required to execute any work

or to, take any measures or do anything, a reasonable time shall be named in such notice, requisition or order within which the work shall be executed, the measure taken or the thing done.

(2) If such notice, requisition or order is not complied with within the time so named, then whether or not a fine is provided for such default and whether or not the person in default is liable to punishment or has been prosecuted or sentenced to any punishment for such default, the Commissioner may cause such work to be executed, or may take any measures or do anything which may, in his opinion, be necessary for giving due effect to the notice, requisition or order as aforesaid.

(3) If no penalty has been specially provided in this Act for failure to comply with such notice, the said person shall, on conviction be punished with fine not exceeding fifty rupees for such offence."

We find that this contention also has to be upheld. A combined reading of Section 230(1) and Section 406 makes it clear that the Commissioner has enough powers to execute any work or to take any measure after giving reasonable time to the defaulter to do the same. Therefore, the case that Section 230 cannot be made use of for the purpose of removal of encroachment in question for want of powers with the Commissioner cannot be sustained. According to the appellants' counsel, the nature of the construction being one which needed immediate action, a short notice alone was given. The action of the appellants under these circumstances was well within the powers u/s 406 and cannot be said to be one without jurisdiction. The contention that the action of the Commissioner was in excess of the powers cannot be accepted,

8. The learned counsel for the appellants raised an additional plea that interlocutory application filed was not maintainable since it was based on an independent cause of action and was not ancillary to the judgment rendered on 18-4-1980 and that the petitioner should have filed a separate O. P. In support of this submission, reliance was placed on the decision reported in *State of Kerala v. Govindan Nair* 1980 Ker LT 186 before the learned Judge and before us. The learned Judge after noticing this decision observed,

"On the facts and in the circumstances of the case. I do not think that this Court would be justified in declining to enforce the directions contained in the consensual judgment, without doing violence to their true spirit, on a technical plea in the nature of one raised by the respondents."

With great respect, we find that the learned Judge did not consider the objection raised on this judgment on merits in detail. The judgment in O. P. No. 1178 of 1980-F dated 18th April. 1980 gave a direction to the appellants to allow the petitioner to shift his milk booth to the place suggested in Ext. P-3. The subsequent action, taken by the appellants, which formed the subject matter of the C.M.P., was as a sequel to the construction by the petitioner of a building contrary to Ext. P-3 and against the details contained in Ext. R-2 sketch. The

demolition was as a result of this unauthorised construction. The petitioner in the C.M.P. therefore complained of an independent action unconnected with the direction given in the judgment in O. P. No. 1178 of 1980. Under these circumstances, it may not be proper to hold that the Corporation was putting forward a technical plea that the C.M.P. was not maintainable.

9. In 1980 Ker LT 186, the direction originally given read as follows:

"For the reasons given earlier, I quash Ext. P7 and direct the Director of Public Instructions to pass a proper order in accordance with law on the petitioner's application, certainly he will have to take into consideration the position of law in regard to Ext. P-3 and R. 2 of Chap. XXVI K.E.R. which has been indicated above. "The O. P. is disposed of in the above terms. There will be no order as to costs."

The Director of Public Instructions passed an order Ext. A2, pursuant to this direction. With that order, the petitioner in the O. P. was not satisfied. He filed a C.M.P. praying for a direction to pass fresh orders which in effect and substance amounted to a prayer to quash Ext A-2. The learned single Judge quashed Ext. A2 by his order in the miscellaneous petition. The State took the matter in appeal. The order was set aside in appeal. The Division Bench assumed for the purpose of the appeal that Ext. A2 was passed in violation of the judgment in the O. P. and still posed the question whether the subsequent order could be set aside on a mere C.M.P. for direction, and answered it against the petitioner. The prayer asked for was not granted in that case for the reason that to grant the said prayer would be to flood this Court with miscellaneous petitions claiming substantial relief. The petition in that case was thus dismissed holding that the petitioner should have moved the Court by an independent O. P. Similar is the case before us, if not stronger. The present complaint is not against any violation of the direction contained in the judgment in the O. P. the present petition is to direct the Corporation to do something outside the direction contained in the original judgment. The violation complained of has nothing to do with the direction contained in the judgment in O. P. No 1178 of 1980-F. but is an independent action unconnected with the judgment. We, therefore, sustain the objection that a miscellaneous petition is incompetent and that the relief claimed should have been in a properly framed original petition.

10. In the result, we allow this writ appeal and set aside the order passed in C. M, P. No. 7987 of 1980,

11. It is the admitted case that the respondent was permitted to put up his milk booth in accordance with Ext. P-3 order and Ext. R-2 sketch. It is submitted by the appellants' counsel that on account of certain subsequent developments, the Corporation is now helpless to permit the respondent from putting up the milk booth in the spot indicated in the sketch. The new development mentioned is the judgment rendered by this Court in O. P. No. 6002 of 1981 and connected petitions in which it has been held that the Corporation does not have powers to

grant lands vusted in it to strangers, except for the purposes mentioned in the Act. if the petitioner is now permitted to put up a milk booth in the place noted in Ext. R-2 sketch, that would amount to going against the judgment mentioned above. Under these circumstances, the learned counsel for the respondent made a fervent plea to give appropriate directions to the Corporation to rescue the respondent from this predicament. According to him. alternative site is available in poromboke land near the Law College, the allotment of which was at one stage requested for by the respondent. When we put this request to the learned counsel for the appellant-Corporation, he agreed that the Corporation would grant to the petitioner such alternative site in the poromboke land, near the plot in question, as is expedient for the Corporation. This submission is recorded. We hope that the allotment of the land as agreed would be made as expeditiously as possible.

12. We allow this writ appeal and direct the parties to bear their costs.